United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-1373

B
P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

EVARISTO CALDERON-ARBELOS,

Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

---

Appellant's Appendix

GOLDBERGER, FELDMAN & BREITBART
Attorney for Appellant
401 Broadway, Suite 306
New York, N.Y. 10013

J. JEFFREY WEISENFELD
On the Brief

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3

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

DOCKET ENTRIES

D. C. Form No. 100

CRIMINAL DOCKET

75 CR 408

BARTELS, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: J. O'BRIEN
vs.	for deft. Garcia: George Sheinberg 66 Court St. Brlyn, NY UL 2-5262
BEATRICE HERNANDEZ a/k/a "Betty Hernandez"	
EVARISTO CALDERON-ARBELOS,	for deft CALDERON: Jerry F 925-2103 401 Bdway, N
JAIME BAHAR	
JOSE GILLERMO GARCIA	For Defendant. Manuel Alz
JORGE EDGARD ALZATE	Kunstler, Kunstler & H 370 Lexington Ave. 725-5970
MANUEL DOMINGO ALZATE-POMBO	
RAFAEL ROBAYO and	for deft Jorge Alzate: Robert Rosenberg 327 S. 17th St. Phila. P
MANUEL NAMMUR	Local atty: Steven Hyma 370 Lexington Av. 725-59

did conspire to distribute hashish

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBU
Fine,			10-9-75	Manuel Alzate Calderon	5	-	
Clerk,			10-10-75	Paid to Treas {Arbelos	-		5
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							

DATE	PROCEEDINGS
[illegible]	Before COSTANTINO J - Indictment filed - Bench Warrants Ordered and Issued for defts NAMMUR & RAFAEL ROBAYO.
5/19/75	Before BARTELS,J.- Hearing adjd to 5/20/75 at 9:00 A.M.
5/20/75	Before BARTELS,J.- Case called- Defts and counsel present-Emil Rodri sworn as interpreter-Defts Calderon and Bahar arraigned and enters pl of not guilty- defts' motion for reduction of bail argued- granted Court orders bail reduced to $20,000.00 Surety Bond- trial set for at 10:00 A.M.
5-22-75	Govts Notice of Readiness for Trial filed
5-22-75	Before BARTELS J - case called -defts present with attys except for E. Moore and deft Hernandez - court interposes a plea of not

75 CR 408

	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFEND
	motion for reduction of bail argued and granted - bail for defts set		
	at $20,000 surety - for a joint bond of $40,000 surety to be forfeited		
	should either deft fail to appear. trial set down for 6-30-75 @ 10:00		
-22-75	Notices of Appearances filed for defts MANUEL ALZATE, JORGE ALZATE,		
	& JOSE G. GARCIA.		
5-29-75	Before BARTELS J - case called - defts motion granting reduction of		
	bail argued - decision reserved		
5/30/75	By BARTELS,J.- Order filed setting forth requirement for bail as to d		
	Manuel Alzate and Edgard Alzate, etc.		
6-4-75	Letter of June 4, 1975 filed received from Chambers from counsel		
	for deftJorge Alzate for extension of bail limits to include Miami,		
	Florida and East New York, N.J. and bail limits for Manuel Alzato		
	Pombo shall be extended to East New York, N.J. It is further ordered		
	that both defts shall surrender their current passport on or before		
	June 11, 1975 at 10:00 AM. So ordered by Judge Judd on June 4,1975		
	(See notation of Judge Judd on bottom of letter)		
6-4-75	Consent Order filed that bail limits for defts JORGE ALZATE shall		
	be extended to Miami, Fla. and East New York, N.J. and bail limits		
	for MANUEL ALZATE-POMBO be extended to East New York, N.J. It is		
	further agreed that both defts shall surrender their current passpor		
	on or before June 11, 1975 @ 10:00 am.		
6-6-75	Before JUDD, J- case called - deft Calderone & counsel Jerry Feldman		
	present - defts motion for reduction of bail - motion granted on		
	consent - bail set at $15,000 cash plus $15,000 P.R.B.		
6-6-75	Notice of Appearance filed (CALDERONE)		
6-9-75	By Schiffman, Magistrate - Order for acceptance of cash bail		
	filed (Evaristo Calderone)		
7/1/75	Certificate of engagement for George Sheinberg, esq. filed		
'/ /75	Letter to A.U.S.A. O'Brien from David Michaels, esq. dated 6/24/75 f		
7-1-75	Notice of Motion filed for severance and separate trial as to deft		
	Jaime Behar(forwarded to Chambers)		
7-2-75	Before BARTELS J - case called - defts & attys present - deft		
	BAHAR's motion for severance adjd for argument to July 15, 1975		
	at 10:00 am - deft GARCIA'S motion for reduction of bail -decision		
	reserved - trial set down for Aug. 4, 1975 at 10:00 am.		
7/11/75	By CATOGGIO,MAG.- Copy of Order for acceptance of cash bail filed(B.		
7/18/75	Before BARTELS,J.- Case called- Deft Bahar's motion for severance a		

FINAL DOCKET

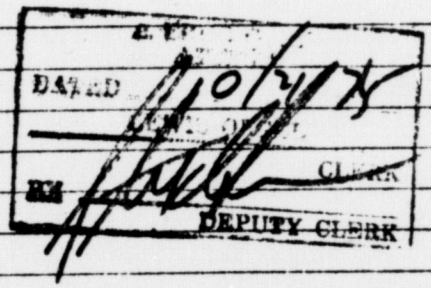
DATE	PROCEEDINGS
	All papers must be received by 7/28/75
7-18-75	Affidavit of Joan O'Brien filed in opposition to motion by deft Bahar for severance and separate trial etc.
7-22-75	75 M 1206 is inserted in CR file.
7-28-75	Notice of Motion filed for an order severing his trial (ARBELOS) from that of co-deft JOSE GARCIA etc. (forwarded to Chambers)
8/4/75	Affidavit in opposition to motion for severance and separate trial f
8-4-75	Before BARTELS J - case called - defts & attys present - deft JORGE ALZATE withdraws his plea of not guilty and enters a plea of guilty after being advised of his rights and on his own behalf - sentence adjd without date - bail contd.
8-6-75	Before BARTELS J - case called - defts & attys present - Emil Rodriguez sworn as interpreter - deft Calderon's motion for severance argued - denied - Carlo Cruz sworn as interpreter - deft Baher's motion for severance argued - denied withleave to reopen at conclusion of Govts case - Jurors selected and sworn - Defts ' motion to dismiss - motion denied - trial contd to 8-7-75.
8-7-75	Before BARTELS J - case called - defts Garcia & Bahar present - deft Calderon not present - attys present - trial resumed - trial contd to 8-8-75.
8-8-75	Before BARTELS J - case called - defts & attys present - trial resumed -Deft GUILLERMO GARCIA after being advised of his rights and on his own behalf withdraws plea of not guilty(during trial) and enters a plea of guilty as charged - sentence adjd without date - bail contd - trial contd to 8-11-75 .
8-11-75	Before BARTELS J - case called - defts & attys present - trial resumed - Deft BAHAR's motion to dismiss argued - granted- court orders the indictment dismissed as to deft BAHAR. Trial contd to Aug. 12, 1975 at 10:00 A.M.
8-11-75	By BARTELS J - Order of dismissal filed (BAHAR)
8-12-75	Petition for Writ of Habeas Corpus Ad Testificandum filed
8-12-75	By Bartels J - Writ Issued, ret. forthwith.
8-12-75	Before Bartels J - case called - defts & attys present - trial resumed - deft Calderon rests - court rules that all evidence as to deft Calderon has been connected and is ordered received into evidence - Mr.Feldman sums up for deft Calderone

PROCEEDINGS

	Jury retires for deliberations at 3:10 PM -Order of sustenance signed (coffee etc) At 8:35 PM Jury returns with a verdict of guilty as to deft Calderon - defts motion to set aside the verdict - denied - trial concluded - sentence adjd without date - bail contd.
8-13-75	By Bartels J - 2 orders of sustenance filed (dinner & coffee etc.8-1
8-14-75	Writ retd and filed - Executed (Bahar)
8-28-75	Stenographers transcript filed dated Aug. 12, 1975 (EVARISTO CALDEI ARBELOS) pgs 773 to 919.
9-5-75	Before BARTELS J - case called - deft HERNANDEZ & counsel E.Moore present. On motion of AUSA O'Brien the Indictment is dismissed.
9-5-75	By BARTELS J - Order of dismissal filed (HERNANDEZ)
9/22/75	By BARTELS,J.-Copy of order releasing bail filed(HERNANDEZ)(order in
10-3-75	Before BARTELS J - case called - deft MANUEL DOMINGO ALZATE-POMBO and counsel S.Hyman present - On motion of AUSA O'Brien the Indictment is dismissed. ~~Deft: GARCIA sentenced to imprisonment for 3 plus special parole term of 3 years in addi~~
10-3-75	By BARTELS J - Order of dismissal filed (MANUEL DOMINGO ALZATE-POMBO)
10-3-75	Before BARTELS LJ - case called - deft Garcia & counsel G.Sheinberg present - Albert Barron-Boyne sworn as interpreter - deft sentenced to imprisonment for 3 years plus special parole term of 3 yrs in addition to such term of imprisonment. Deft EVARISTO F. CALDERON-ARBEL present with counsel Jerome Feldman - deft sentenced for treatment a supervision pursuant to the provisions of the Y.C.A. T-18, U.S.Code, Sec. 5010(b) until discharged by the Youth Corrections Div .Also imposed is special parole term of 5 years in addition to such term o imprisonment. Bail contd pending appeal. Deft JORGE EDGARD ALZATE-PO and atty Robert Rosenblum present.Deft is sentenced to imprisonment for 2 years plus special parole term of 3 years. Deft to surrender Nov. 3, 1975 at 10:00 am. Bail contd. Deft MANUEL DOMINGO ALZATE-POMBO & counsel Steven Hyman present. On motion of AUSA O/Brien the Indictment is dismissed.
10-3-75	By BARTELS J - Order of dismissal filed (MANUEL DOMINGO ALZATE-POMBO)
10-3-75	Judgment & Commitment filed - Certified copies to Probation. (JORGE EDGARD ALZATE POMBO, EVARISTO F. CALDERON-ARBELOS & JOSE GUILLERMO GARCIA)
10/8/75	Certified copy of Judgment andCommitment retd and filed-deft delivered MCC
10-9-75	Notice of Appeal filed (CALDERON-ARBELOS)
10-9-75	Docket entries and duplicate of Notice of Appeal mailed to the Court Appeals.

NAL DOCKET

DATE	PROCEEDINGS
10/16/75	Order received from court of appeals and filed- that record be do on or before 10/28/75
10/21/75	Record on appeal certified and mailed to court of appeals



NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Appellee,

-against-

EVARISTO CALDERON-Arbelos,

Appellant.

Docket Number 75 Cr. 488

John R. Bartels
(District Court Judge)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
OCT 9 1975
TIME A.M.
P.M.

NOTICE OF APPEAL

Notice is hereby given that EVARISTO CALDERON-ARBELOS appeals to the United States Court of Appeals for the Second Circuit from the [X] Judgment [ ] order [ ] other (specify) _____ entered in this action on October 3, 1975 (Date)

JERRY FELDMAN
(Counsel for Appellant)

Address 401 Broadway Suite 306
New York, N. Y. 10013

Date October 6, 1975

To: Hon. David G. Trager
225 Cadman Plaza East
Brooklyn, New York

Phone Number 925-2105

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY) TRANSCRIPT INFORMATION - FORM B

▶ QUESTIONNAIRE	▶ TRANSCRIPT ORDER	▶ DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).
[X] I am ordering a transcript [ ] I am not ordering a transcript Reason: [ ] Daily copy is available [ ] U.S. Attorney has placed order [ ] Other. Attach explanation	Prepare transcript of [ ] Pre-trial proceedings [X] Trial - only summations and charge to jury August 12/75 [X] Sentence - October 3, 1975 [ ] Post-trial proceedings	

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment [ ] Funds [ ] CJA Form 21

ATTORNEY'S signature Jerry Feldman DATE October 6, 1975

7-850

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

-against-

Cr. No. _____
(T. 21, U.S.C., §846)

BEATRICE HERNANDEZ, a/k/a
"Betty Hernandez",
EVARTSTO CALDERON-ARBELOS,
JAIME BAHAR,
JOSE GILLERMO GARCIA,
JORGE EDGARD ALZATE,
MANUEL DOMINGO ALZATE-POMBO,
RAFAEL ROBAYO and
MANUEL NAMMUR,

Defendants.
----------x

THE GRAND JURY CHARGES:

On or about and between the 14th day of April 1975 and the 6th day of May 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants BEATRICE HERNANDEZ, a/k/a "Betty Hernandez", EVARISTO CALDERON-ARBELOS, JAIME BAHAR, JOSE GILLERMO GARCIA, JORGE EDGARD ALZATE, MANUEL DOMINGO ALZATE-POMBO, RAFAEL ROBAYO and MANUEL NAMMUR did knowingly and intentionally conspire to possess and distribute approximately 800 pounds of hashish, a Schedule I controlled substance in violation of Title 21, United States Code, Section 841(a)(1). (Title 21, United States Code, Section 846.)

A TRUE BILL.

s/ J. Lunt
FOREMAN.

s/ David G. Trager / by E.R. Kosman
UNITED STATES ATTORNEY

THE COURT: Well, ladies and gentlemen, you have listened most attentively to the testimony and to the summations. As I told you at the beginning of the case the testimony presents the facts through witnesses and exhibits and the summations present the arguments of the attorneys, pro and con, concerning those facts.

The time has come for you and for me to perform our respective functions in the trial of this case and of course I must add also to what the attorneys have said and that is, that you have been patient. You have heard the voices of the attorneys and of course, now your voice will be heard and my voice, too, will be heard.

Let me also say that I deeply appreciate the attentiveness and the alertness of all of you during the course of this trial and I wish to express again my appreciation for any sacrifices each and every one of you may have made in neglecting your business or personal affairs to see that the ends of justice might be accomplished in this case.

We have had some delays, really most unusual and some unavoidable interruptions but you have been tolerant of those delays and have continued your intense

interest in the case and I wish to thank you very much for that interest and for your patience.

Now, every criminal case, ladies and gentlemen, is important to the Government of the United States and it is equally important to this defendant on trial and each is entitled to equal justice at your hands.

From my experience, justice is best dispensed in a calm, patient, careful and deliberate manner, and I sincerely request you to keep that attitude throughout your deliberations when you enter into the jury room.

Of course, you must respect the viewpoints of your fellow jurors. You should talk to each other with consideration and intelligence and decide the issues in this case on the merits and on the merits alone. However, each juror should reach his own conclusion, and no juror should surrender or compromise his own beliefs or conviction as to the innocence or guilt of this defendant.

The evidence consists, as I said before, of the testimony of the witnesses, the exhibits admitted into the record and any facts which may have been stipulated by counsel which I think there were some. You must not consider any evidence which the Court has

instructed you to disregard. The quality of evidence is not necessarily determined by the number of witnesses testifying for one side or the other.

You have heard the evidence. You have heard the arguments and now I must give you the law governing this case. It is your duty to accept the law as it is given to you by the Court and to determine the facts of the case for yourselves. The proper application of the law of the case to the facts of the case as you find them to be will determine what your verdict should be.

I wish to make it very plain to you that the full responsibility and the full power in determining the facts are with you, and anything that I may say, or seem to say, as indicating any view or opinion as to the facts is to be completely ignored by you.

In determining the facts, you should not be influenced by any rulings that the Court may have made during the trial. Those rulings dealt with matters of law and did not deal with any question of fact.

Of course, any ruling on objections made by the attorneys and any questions the Court posed to any witness are not to be considered by you as indicating the guilt or innocence of this defendant. The same is true with respect to any inflection of the Court's

voice relative to any such matters, or in connection with any comments or statements the Court may have made to any of the attorneys.

You may wonder why the Court asked the witnesses certain questions from time to time. The reason was that some of the testimony raised questions in the Court's mind and the Court felt that those questions might have been also raised in the minds of the jury. For the sake of clarity only were those questions asked, and they must not be deemed by you as any indication of any opinion that the Court might have in this case.

The Court expresses no opinion as to the guilt or innocence of the defendant. The determination of such guilt or innocence is a matter that rests exclusively with you.

Now, there are some general principles of law which are of importance in every criminal case, and I wish, first, to make some statements which apply to criminal cases in general; after which I shall endeavor to make clear to you what this particular case involves.

As I said before at the beginning of the case, it is an established principle that an indictment is

but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and it does not create any presumption of permit any inference of guilt to be drawn against this defendant.

It is likewise a principle well recognized in law that every person who is charged with a commission of a crime is presumed to be innocent and the burden rests on the Government to prove to your satisfaction beyond a reasonable doubt every element of the crime and that the party is guilty as charged. The presumption of innocence remains with this defendant all through the case until, if ever, it is overborne by proof which satisfies you beyond any reasonable doubt that the presumption of innocence no longer remains with the defendant.

The machinery of trial calls for the exercise of varying functions by counsel, by the witnesses who testify, by the Court that presides, and by the jury. You, as the jury, exercise the fact-finding function.

You are the sole judges of the facts. That is to say, it is you who must consider the evidence, weigh the evidence and draw inferences from the evidence, but only from the evidence.

You must distinguish between the mere arguments

of counsel which may have been made before you and the actual evidence upon which those arguments rest. The repetition of the argument, however often, and however loudly or dramatically it is made, does not constitute evidence. You must carefully analyze the assertions which have been made to you by counsel for the defendant and counsel for the Government and ascertain what basis those assertions have in the evidence.

This brings us directly to the charge in the indictment itself.

Now, I think I read this to you once before. It is a very short charge. I will read it.

It says that:

"On or about and between the 14th day of April, 1975 and the 6th day of May, 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants Beatrice Hernandez, also known as 'Betty Hernandez,' Evaristo Calderon-Arbelos, Jaime Bahar, Jose Gillermo Garcia, Jorge Edgard Alzate, Manuel Domingo Alzate-Combe, Rahael Robayo and Manuel Namur did knowingly and intentionally conspire to possess and distribute approximately 800 lbs. of hashish, a Schedule I controlled substance in violation of

Title 21, United States Code, Section 841(a)(1) and Title 21, United States Code, Section 846."

(continued next page)

Charge of the Court

From time to time I shall, in this charge, refer to marijuana rather than hashish which is really what the evidence shows has been involved in this indictment.

Now, two of the original defendants, Jose Guillermo Garcia and Jaime Bahar, prosecuted in this case are no longer parties to the case for reasons I think I have already indicated to you. You however are not concerned with those facts and they should not be at all considered by you when you enter the jury room.

Now, coming back to the indictment, I must describe first the offense which is the subject of the conspiracy. I sincerely hope you do not confuse the offense itself with the conspiracy to commit the offense. So, I should describe to you this offense first so that you understand what the agreement involved.

Now, there is no charge that the offense itself was committed. I shall try very sincerely to make that clear.

Now, I will describe the offense but there is no charge that the offense was committed. The only charge is that they agreed to commit that offense and

that is also a violation of the law.

So, let me describe the offense which is the subject matter of the illegal agreement and I must give you all the evidence of that. But, there is no charge of that offense. He is charged, as I read to you, with a conspiracy to possess and distribute approximately 800 pounds of hashish. That is, a conspiracy in violation of Title 21, United States Code Section 841(a)1 and Title 21, United States Code Section 846.

So, we look to Section 841(a)1 of Title 21 of the United States Code to see what the substantive offense is and that reads in part as follows and I quote:

"Except as authorized by this subchapter it shall be unlawful for any person knowingly or intentionally to distribute or dispense or possess with intent to distribute or dispense a controlled substance."

Now, referring to this unlawful, wilful and knowledgeable distribution of a controlled substance such as hashish or marijuana as set forth in the indictment, Section 841(a)(1) of Title 21 of the United States Code provides that:

Charge of the Court

"It shall be unlawful for any person to knowingly or intentionally distribute any substance such as hashish or marijuana."

Now, the elements of the offense which is a subject matter of a conspiracy are one, that the defendant distributed a narcotic controlled substance such as hashish or marijuana and two, that he did so knowingly, intentionally and wilfully, and that is the offense itself. But, that is not charged against the defendant. The defendant here is charged with agreeing to do that. He is charged with agreeing to possess with intent to distribute this hashish or marijuana.

Now, a controlled substance as used in the statute is nothing more than a drug or substance mentioned in one of the schedules set forth in Section 812 of Title 21 of the United States Code. Marijuana. Marijuana is set forth in Schedule 1 of that section. Therefore, it is covered.

In other words, the statute prohibits the unlawful possession with intent to distribute or the unlawful distribution of hashish or marijuana, as the case may be, with knowledge that it is hashish or marijuana.

Now, it is also to be noted that the prohibition statute is not limited to the sale of hashish or marijuana but the statute prohibits any distribution of hashish or marijuana whether it be sale or otherwise. Consequently, one might violate the statute by knowingly and intentionally conspiring to possess and distribute any amount of hashish or marijuana without receiving any money or other consideration therefor.

In other words, the statute prohibits any unlawful distribution of hashish or marijuana in any manner with knowledge that it is hashish or marijuana.

I must again ask you to remember that the indictment charges simply a conspiracy to possess with intent to distribute a quantity of hashish or marimuana.

As I said before, to understand the conspiracy to commit the crime or offense, you must first have a description of the offense itself and therefore I attempted to describe what the offense is and what is meant by possession with intent to distribute hashish or marijuana.

Now, I will return to the offense of conspiring to possess with intent to distribute hashish or marijuana. Before doing so I should give you a word

or two on possession which is part of the substantive offense.

Possession may be actual, physical possession of the narcotic drug or it may be that possession that is known as constructive possession. That is to say, that although the defendant doesn't have actual, physical possession of hashish or marijuana, the relationship is such with hashish or marijuana that he would have dominion or control over the hashish or marijuana.

Now, possession of the hashish or marijuana which is covered by this conspiracy was the possession of three or four boxes -- I guess three boxes contained in the van driven by Calderon with Bahar sitting in the van which boxes were picked up in Brooklyn and delivered in New York.

So, I must also tell you that the mere presence of a person at a place where the narcotic drug was located or distributed is not sufficient to charge a defendant with constructive possession. There must be some relationship between that defendant and the narcotic drug itself which indicates that he has dominion and control over that particular drug.

The crimes charged in this indictment require

a knowledge of and an intent to commit the crimes charged.

It is obviously impossible to ascertain or prove directly what a man knew or intended. You cannot look into a person's mind and see what his intentions were or what he knew. But a careful and intelligent consideration of the facts and circumstances shown by the evidence in any given case as to a person's actions and statements enables us to infer with a reasonable degree of certainty and accuracy what his intentions were in doing or not doing certain things and the state of his knowledge.

So, in this charge of conspiracy with intent to distribute a narcotic controlled substance such as hashish or marijuana, of course, proof of intent to possess for that purpose is necessary.

Now, we cannot physically, again, look into one's mind and ascertain what knowledge or intent he had. "Knowledge," as well as "intent," is descriptive of a state of mind, and as an element of the offense is seldom, if ever, susceptible of direct proof. The proof of this element of knowledge and intent may rest, as it frequently does, on evidence of facts and circumstances from which it clearly appears as the

only reasonable and logical inference that the defendant conspired to knowingly and intentionally sell hashish or marijuana or to possess the same with intent to sell.

No person can intentionally avoid knowledge by closing his eyes to the facts that would lead a reasonable man to investigate. However, a mere suspicion that something is wrong or improper is not equivalent to knowledge or intent. On the other hand, knowledge and intent may be inferred from the acts of the party and is a question of fact to be determined from all the circumstances, and the jury may scrutinize the defendant's entire conduct at the time the offenses alleged were committed.

The circumstantial evidence sufficient to support a charge of conspiracy to knowingly and intentionally sell hashish or marijuana and a charge of knowledge of illegal possession of hashish or marijuana with intent to so distribute, must be sufficiently persuasive, however, to exclude the inference of innocence under all the circumstances.

(continued next page)

I will attempt and I will actually describe to you the offense of conspiracy.

I ought to warn you in advance it is not an easy offense to describe.

Section 846 of Title 21 of the United States Code, mentioned in the indictment, specifically provides that -- and I quote:

"Any person who attempts or conspires to commit any offense defined in this subchapter" -- which includes Section 841(a)(1) which read to you before as to possession with intent to distribute a narcotic drug -- "shall be subject to the same punishment as prescribed for the substantive offense itself."

In other words, it is in the same category. If you agree to commit it, that's just as bad as if you actually did commit the offense.

Now, the defendant is charged with knowingly and intentionally conspiring to possess with intent to distribute a quantity of hashish and marijuana. For two or more persons to conspire, confederate or combine together to commit or cause to be committed a breach of Section 841(a)(1) of Title 21 of the United States Code is an offense of grave character which involves a plotting, a plotting to subvert the law.

It is almost always characterized by secrecy requiring much time before it can be discovered.

A conspiracy to commit a violation of Section 814(a)(1) is an offense distinct from the actual violation of that section itself. I emphasize that from time to time because I think that should be clear in your minds -- that you don't have to commit the offense which is the subject matter of the illegal agreement. It is sufficient if you agree to commit it.

Now, the crime of conspiracy as charged in this indictment is a separate and distinct crime.

The conspiracy is something apart from and is independent of the offense embraced within its unlawful objective.

The essence of the crime is the unlawful agreement among the parties to commit an offense against the United States. In this case it is a violation of Section 841(a)(1) of Title 21 of the United States Code. That is, to knowingly and intentionally distribute quantities of hashish or marijuana. The actual accomplishment of the unlawful object of the conspiracy is not essential to the crime.

What I am saying is, it was not necessary to show that they actually distributed any of this hashish

or marijuana. The essential element of the crime of conspiracy to violate Section 841(a)(1) of Title 21 of the United States Code, otherwise stated, is the unlawful combination of two or more persons pursuant to an unlawful agreement or a common understanding to commit the offense of knowingly and intentionally distributing quantities of hashish or marijuana or knowingly or intentionally possessing hashish or marijuana for that particular purpose. There is no crime in the absence of such an agreement.

Conspiracy to violate some statutes must be accompanied by an overt act in furtherance of the object or purpose of the conspiracy. But to prove a conspiracy to violate this particular statute it is not necessary to prove an overt act.

There is no requirement that this agreement be a formal agreement in which the unlawful object or objectives of the conspiracy are explicitly stated. Such a requirement would render proof of the agreement most difficult if not impossible. It is sufficient if the minds of the parties meet understandingly on their common purpose to commit the offense.

The mutual understanding or agreement is usually, if not always, an implied agreement. That is,

a mere common understanding among the parties to accomplish by their concerted actions the unlawful object of the conspiracy. Such an agreement or mutual understanding is generally a matter of inference deduced from the acts of the person accused, done in pursuit of their apparent criminal purpose.

It is not necessary that each party to the agreement know the identity of all the other members of the conspiracy or have direct contact with all such members or know all the details of the conspiracy and the parts to be played by his fellow conspirators. This is because a conspiracy may contemplate a chain of events or a chain of acts to accomplish its objectives and the acts of any given member or members of the conspiracy may be only one link in that chain.

Where you have one or more defendants who are accused of being members of a conspiracy which is consistent with such chain of events, you must find that each defendant not only knows of the objectives of the conspiracy but that in order to promote his own interest or because he has a stake in the venture he adopts the venture as his own.

In this case there is no evidence that the defendant Calderon knew the original defendants, Manuel

Namur, Raphael Robayo, Manuel Domingo Alzate-Combo and Jorge Edgard Alzate who were the original conspirators.

However, there was evidence that Jose Guillermo Garcia was in contact with Jorge Alzate and Manuel Alzate and that Alzate was in contact with Manuel Namur and Raphael Robayo and further that Calderon was in contact with Garcia.

Now, whether Calderon was a link in the chain in connection with this overall conspiracy is a matter which must be decided only by you. You will consequently have to decide whether the contacts of Garcia to Colombia and of Calderon to Garcia in any way connected him with this conspiracy and of course, in deciding his overall connection, whether he was a party to the conspiracy, as I say, at the end of the chain, this must be established by the Government beyond a reasonable doubt.

Now, let me say a word about the charge of conspiracy.

To find the existence of a conspiracy you must first determine from all the evidence in the case relating to the period of time embraced in the indictment, whether or not a conspiracy, as I have defined that term, actually existed.

Now, if you decide that a conspiracy actually did exist then you must next determine as to each defendant involved -- and in this case we have only one remaining -- whether or not he was a member of that conspiracy.

In determining whether or not a particular defendant was a member of a conspiracy you must do so by evidence as to that particular member's own conduct, that is, evidence from others of what he himself said or did.

In determining the preliminary question of whether a man became a member of the conspiracy you must not consider the evidence of what others said or did but only the evidence of witnesses as to what this particular defendant said or did.

In other words, you must determine the membership of a particular defendant -- in this case Calderon -- in a conspiracy from the evidence and testimony of the witnesses concerning Calderon's own actions and his own conduct and his own statements.

However, once you have determined that this particular defendant was a member of the conspiracy, using this test, you may then consider as if made by him, the statements and declarations of the other co-

conspirators, made thereafter, in furtherance of the conspiracy and during the existence thereof.

The guilt of a defendant once he is proven to be a member of the conspiracy may be established by any act of his fellow conspirators during and in furtherance of the conspiracy without proof that the defendant did every act constituting the offense.

Any party coming into a conspiracy at any stage of the proceedings with knowledge that an illegal scheme or conspiracy is in operation becomes under the law a party to and responsible for all acts done before or after his joining it, by any of the other parties in furtherance of the conspiracy.

One who joins such a scheme or conspiracy adopts for himself and makes himself responsible for all that preceded as well as all that which is done during his personal participation.

On the other hand, acts done or statements or admissions made after the termination of the conspiracy by a particular conspirator, while binding on that particular conspirator have no binding effect upon the other conspirator unless made in his presence.

(Continued on next page.)

Now, the mere association or acquaintance of a defendant with others or with another defendant without more does not establish the existence of a conspiracy.

However, one may be guilty of a conspiracy to commit a crime even though he did not himself participate in the actual commission of the crime. As I said before, one can be guilty of agreeing or conspiring to commit a crime even though the crime itself was not committed.

There is upon the Government the burden to prove beyond a reasonable doubt that this defendant against whom the charge of conspiracy was made was a party to the conspiracy mentioned in the indictment and that the object of the conspiracy was to commit a crime.

Now, it is not require that each of the conspirators participate or have knowledge of all of the conspiracy operations. The guilt of a conspirator is not governed by the extent of his participation. As I said before, he need not know of all of the alleged conspirators.

This case has been a short one and I am not going to give you a resume of the testimony because I think you will remember what the testimony was as well, if not

better, than I.

Of course, you must understand this Court has not and does not express directly, subtly or otherwise, by intonation or gesture any opinion as to any of the facts in this case. It is your recollection of the facts that will count in this case.

I should just recall to your mind that there were certain witnesses that were presented to you. They were examined and cross-examined. Just to refresh your recollection I will give you their names:

William Kilgallon. He was a detective with the Police Department for eleven years.

Lawrence McDonald. I think he was a New York State trooper assigned to the New York Task Force.

John Bruno, a New York City police detective for fourteen years assigned to the DEA Joint Task Force.

Jorge Alzate, one of the original conspirators named in the indictment.

Angel Rodriguez, a New York City policeman assigned to the DEA Joint Task Force.

Robert Henderson, retail auto salesman for Porsch Audi on 57th Street and 11th Avenue.

Joseph C. Herman, general manager of Porsche-Audi, 57th Street and 11th Avenue, in Manhattan.

The defendant offered a witness who was also examined, Mitchell Lampert, a police officer for eight years, also assigned to the DEA Joint Task Force for two years.

The defendant by his plea of not guilty has completely denied that he conspired knowingly, intentionally or otherwise to possess and distribute any marijuana or hashish. He denies any participation in this conspiracy.

The defendant did not take the stand. The law does not compel a defendant to take the stand and testify and no presumption of his guilt may be raised and no inference of any kind may be drawn from the failure of this defendant to testify. Nor should this fact enter into your discussion or deliberations in any manner whatsoever.

In passing I should inform you that the law does not require the prosecution to call as witnesses all persons who may have been present at any time or at any place or who may appear to have some knowledge of the issues in this trial.

Both parties have subpoena power and either side may call in witnesses by serving a subpoena.

The Government's case against this defendant rests

both on the direct and circumstantial evidence.

As to the subject of circumstantial evidence, circumstantial evidence is evidence of a fact from which you may reasonably infer the existence or non-existence of another fact.

For example -- and I give this illustration often -- if a person comes into your home wearing a raincoat which is wet, carrying an umbrella which is wet, that would be circumstantial proof, of course, that it is raining outside even though you did not otherwise know that it was raining.

I will give you another illustration, perhaps a little closer to home here in the courtroom.

Suppose a member of thejury, the forelady, was to ask the courtroom clerk, Mr. Nims, for a pad and pencil in order to make some notes. Suppose after the jury took a recess and came back the court reporter, Miss Ginsberg, not the clerk Mr. Nims, of whom the request was first made, was to hand the forelady a pad and pencil. That would be clear circumstantial evidence that Mr. Nims had given Miss Ginsberg the forelady's message and as the words indicate, circumstantial evidence means evidence involving circumstances surrounding the incident and details as distinguished from direct

personal observation.

Now, it is more than and it is fundamentally different from mere conjecture or surmise for under our law no man is to be convicted on the basis of guesswork or speculation.

An inference reasonably drawn from the facts testified to is evidence.

In analyzing the evidence you may draw reasonable inferences based upon your own common sense and your own general experience from any facts that you find were proven.

While an inference may be reasonably drawn from a proven fact it is not to be drawn from another inference. When two inferences may be drawn from a proven fact, one consistent with guilt and one consistent with innocence, you must draw the inference of innocence. Now, I am assuming that both these inferences can be reasonably drawn from the fact.

A logical inference is to be distinguished from speculation and suspicion. Circumstantial evidence, members of the jury, is legal and acceptable evidence. It is that evidence which tends to prove a disputed fact by means of proof of other facts which have a legitimate tendency to lead the mind to a conclusion

that the factsto be proved have been established.

Circumstantial evidence may consist of an accumulation of many details which are so logically interrelated and so consistent with each other and they are so inherently probable that you may not have the slightest doubt as to their truthfulness and accuracy and the result which they tend to prove.

As a general rule the law makes no distinction between direct and circumstantial evidence. Circumstantial evidence may be enough to convict but the circumstantial evidence must be so convincing that it leaves you with no reasonable doubt. If you have a reasonable doubt after you consider all the circumstantial evidence and other evidence in the case as to this defendant then of course you must acquit him.

We come now to another phrase which I have used in this charge and that is reasonable doubt.

Reasonable doubt is not a term I can describe to you with mathematical certainty so that one can determine whether he has reasonable doubt just as though he is operating a computer. That cannot be done.

The term "reasonable doubt" as used in this charge does not mean just any possible doubt that you might have, but it means such reasonable doubt as a

careful, prudent and reasonable man or woman ought to entertain in the circumstances proved. It means a doubt based on reason, and which is reasonable in view of all of the evidence. The key word is "reasonable." A reasonable doubt may arise from the evidence produced or from the lack of evidence in the case. It is the obligation of the Government to prove a defendant guilty beyond a reasonable doubt but it is not required to prove a defendant guilty beyond a shadow of a doubt. It is rarely possible to prove anything to an absolute certainty or beyond a possible doubt. Seldom can one prove a controversial fact with mathematical certainty. A reasonable doubt does not mean a vain, fanciful, vague or whimsical or imaginary doubt, nor does it mean a possible doubt created by a reluctance on the part of the jury to perform an unpleasant task. It means a doubt arising out of the evidence or lack of evidence which is a reasonable doubt. A reasonable doubt is a doubt that would cause a prudent man to hesitate to act in matters of importance to himself.

If after a fair and impartial consideration of all of the evidence or lack of evidence you have a reasonable doubt as to the defendant's guilt, then it is your duty to acquit him. On the other hand, if

after a fair and impartial consideration of all of the evidence you believe that you have no doubt that is reasonable as to the defendant's guilt, then it is your duty to convict him.

One is said to be convinced in a case of this kind beyond a reasonable doubt when, after an impartial comparison and consideration of all of the evidence, one can conscientiously say that he is convinced to a moral certainty of the truth of the charge.

Thus, you look at all of the evidence introduced into this case and you ask yourselves whether or not you are satisfied beyond a reasonable doubt that the offense has been committed as charged in this indictment. If you are so satisfied then it will be your plain duty to convict this defendant. But if there exists in your minds a reasonable doubt of this defendant's guilt it is equally your plain duty to give him the benefit of that doubt and acquit him.

As I indicated and I am repeating it, two of the original defendants are not parties to this action for reasons which you have no concern with whatsoever. Therefore, under no circumstances should you consider this fact when you enter into your deliberations and considerations in the jury room.

I might say in passing, if there are reasonable conclusions equally supported by the evidence, one consistent with the guilt of the defendant and one with innocence, then you must adopt the conclusion consistent with innocence and acquit him.

Reasonable doubt is a question only to be determined by you. The key word is "reasonable." Reasonable doubt is not to be determined by arguments of counsel.

In reaching your conclusions you must consider all the evidence together, both direct and circumstantial, not just a particular segment or portion of the evidence which might be isolated from the rest of the evidence.

A statement about the credibility of witnesses. I have given you their names and it will be up to you to determine also whether they are telling the truth.

Now, in considering the evidence you are going to exercise the exclusive function of passing on the credibility of the witnesses. You can see that this is a very important function, because to determine where the truth lies you must of necessity decide who is telling the truth. How you are to do this is left to your own determination. Among other things, in determining the credibility of a witness, the jury may consider his motive in testifying, his manner and

demeanor on the witness stand, his interest, prejudice or bias, if any, whether he has a purpose of interest to serve which might color his testimony. Interest does not necessarily mean that a witness is untruthful. It is merely an element that you may consider, in reaching your determination, upon the question of whether he is telling the truth. To use a colloquial expression, you "size him up." You determine whether he strikes you as a fair and candid witness, or whether he strikes you as a person who is not telling the truth either intentionally or unintentionally. You may consider the witness's state of mind, his ability to tell the truth and whether he impresses you as having a fairly accurate recollection of the matters about which he testified. You may consider inconsistencies or discrepancies in his testimony or you may consider his testimony and the testimony of any other witness. Another consideration is whether the witness has in any way been contradicted by any other evidence. It is for you to determine whether a witness, whoever he or she may be, is telling the truth with respect to some of the facts or all of the facts or whether he is telling the truth at all.

The test you apply is the same test you would

apply in your everyday business or home affairs, where you are called upon to make a similar determination in your personal life from time to time. You must not think when you enter the jury box you lay aside your business or everyday experience. That is simply not so. You are now being called upon, indeed, to use that business or everyday experience to assist you in determining the truth as it applies to this case. You are, of course, to exercise your common sense in applying the law as I have given it to you, to the facts of the case as you find those facts to be.

You have been sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the not-guilty plea of the defendant. Let your verdict be without any prejudice and without any bias and without any sympathy. You are a fact-finding body and it is your duty to decide whether the acts charged in this indictment have been committed by this defendant beyond a reasonable doubt. You are to perform this duty without any fear, without any bias and without any prejudice to either party. The law does not permit jurors to be governed by any fear, sympathy, prejudice or even by public opinion.

In arriving at your decision you should consider the evidence in the light of your own experience and by the exercise of your own knowledge and, in particular, by the exercise of your common sense.

You must not permit any plea of sympathy to enter your verdict. The accused and public expect that you will carefully and impartially consider all of the evidence and follow the law as stated by the Court and reach a just verdict regardless of the consequences.

In conclusion let me say again, it is your duty to weigh the evidence carefully, dispassionately, calmly and to reach a conclusion about the case as to the facts which are wholly within your finding.

The only question for your consideration is whether this defendant is guilty or innocent of this charge of conspiracy in the indictment for which he is on trial and if you are satisfied that he is guilty it is your plain duty to convict him. If you have a reasonable doubt about the matter it is equally your plain duty to acquit him.

Now, the punishment provided by law if the defendant is found guilty, is a matter exclusively within the province of the Court. You cannot and you should not

allow consideration of any punishment which may be imposed on the defendant to influence you in arriving at an impartial verdict as to the defendant's guilt or innocence.

It is for the Court to determine any mitigating or any other special circumstances which may require consideration in the case. So, you should not be concerned with the question of punishment.

Ladies and gentlemen, all twelve of you must agree, whichever way you find. In other words, your verdict must be unanimous. You must take the count of the indictment and determine the guilt or innocence of this defendant.

The form of your verdict should be:

"We, the jury, find the defendant not guilty as charged," or

"We, the jury, find the defendant guilty as charged."

If you wish any testimony of any witness to be read to you or you have any further questions please send in a note to the marshal who will relay that request to me.

As I have indicated to you, I know jury service is not always pleasant and it is rarely convenient.

However, jury service is one of the keystones of our system of American justice and democratic government. I want to thank each and every one of you for your outstanding devotion, as citizens, to your important work as jurors and your patience in connection with these unavoidable delays.

May you, acting in accordance with the evidence and the law, by your verdict declare the truth and proclaim the cause of righteousness and justice in this matter.

If you desire to examine any of the exhibits they will be delivered to you upon request, and if after you have retired, you desire to be informed on a point of law arising in the case or to have any part of the testimony clarified, you should ask to be returned to the Court for further instructions.

At this point we will take a five-minute recess in order that I may hear applications to be made by counsel. I request you not to consider this case until you are brought back at the end of this short recess.

In the meantime, I guess I can take this opportunity to thank the alternates and at the same time excuse them. Both of you have acted as insurance policies against sickness or unavoidable failure of

other jurors from appearing. Now that we are all here and they can deliberate after their return, I excuse both of you and thank you very much.

We will take a short recess, ladies and gentlemen.

(Jury excused.)

(The following was heard in the absence of the jury.)

THE COURT: Do you want to make some requests?

MS. O'BRIEN: I have no objections. I have one request: that they be instructed that if they find beyond a reasonable doubt that Mr. Calderon participated in a conspiracy to possess or distribute 600 pounds of marijuana, three crates rather than the 800 pounds, that he is equally guilty.

MR. FELDMAN: I think that was indicated. I don't see the necessity --

THE COURT: Not too much.

Why don't you just say that we will consider the indictment amended to just 600?

MS. O'BRIEN: Well, if they find him guilty of conspiracy for 600 it's as good as 800. That's what I would like to have them instructed on.

THE COURT: What do you have to say?

MR. FELDMAN: I think your Honor did mention

narcotic drugs a number of times and I'm curious --

THE COURT: Yes, you are right. I will make it clear that when I talk about narcotic drugs I am talking about marijuana.

MS. O'BRIEN: It's a controlled substance, not a narcotic drug.

THE COURT: I am perfectly willing to make that change. It is not a narcotic drug. It is a controlled substance. That was a mis-description.

Most cases I have are generally narcotic drug cases --

MR. FELDMAN: I'm sure they are, Judge.

THE COURT: All right. I will say that --

MR. FELDMAN: I don't believe the Government has made a distinction between six and eight hundred pounds and I think to say anything with regard to that would be accentuating, in fact --

MS. O'BRIEN: The indictment reads 800 and they could very well find that he willingly participated in the conspiracy as to the 600.

THE COURT: I am going to say that it makes no difference -- well, they can't find 800.

MS. O'BRIEN: It is our position that the fourth crate is part of the conspiracy.

THE COURT: Well, first, I am going to say that

it is not a narcotic drug but a controlled substance. That is with reference to hashish and marijuana.

All right. Bring them in.

(Jury enters the jury box.)

THE COURT: There are two amendments I'd like to make to my charge, ladies and gentlemen.

The first is, from time to time I think I mentioned "narcotic drugs." I meant to say "a controlled substance" because marijuana and hashish are not narcotic drugs although they are controlled substances covered by the statute.

One other suggestion is that the indictment refers to a conspiracy to intentionally possess and distribute 800 pounds of hashish. It would be sufficient if the jury finds that the conspiracy covered only 600 pounds of hashish.

With those changes you may immediately proceed to deliberate.

I'm sorry that it took so long to begin and there were some unavoidable delays that do not often happen.

If any of you wish coffee we will have it sent up to you. Take the orders of those ladies and gentlemen, please.

(Whereupon two deputy United States marshals were duly sworn by the clerk of the court at 3:15 p.m.)

THE COURT: You can get them a doughnut or bun. I think they are entitled to that in view of the fact that the Government would have paid for their lunch.

JUROR NO. 8: We will agree to be reimbursed.

THE COURT: You cannot be reimbursed.

(Jury excused for deliberations at 3:15 p.m.)

(Continued on next page.)

(Out of hearing of the jury.)

THE COURT: The Court has just received a note from the jury in which it wishes read to it certain testimony and wishes that the list of evidence and Calderon's business cards be sent to it. I will mark this note as a Court Exhibit.

How do you want to read all the testimony, we have Mr. Nims to read it. If he gets tired we will have Mike Miele.

MR. FELDMAN: Mr. Nims is certainly satisfactory.

MS. O'BRIEN: There are some statements made in the suppression hearing.

THE COURT: I will tell them how many pages it is and they may want to go back and be more specific.

MR. FELDMAN: I think that's reasonable.

THE COURT: If that is agreeable to you then they may go back and talk among themselves and be more specific. Is that agreeable to you?

MR. FELDMAN: I would ask the Court to indicate the amount of pages involved.

THE COURT: You must remember they don't have too much experience. I will say this, if it's agreeable, because they have a right to have the whole thing read over, I want to guide them. What I would say,

"You are entitled to have all of the testimony of Kilgallon's testimony and all of Alzate's testimony but since Kilgallon's is 170 and Alzate's testimony -- the Court is wondering whether you could be more -- want to consider whether you have any specific phases of that testimony."

MS. O'BRIEN: They ask the testimony of the matchbook.

MR. FELDMAN: I didn't want to create that something that pinpoints just that. I don't want to pinpoint just the matchbook and exclude everything else.

THE COURT: If they say just the matchbook then I will say, are you sure that it isn't other testimony because you have listed this specifically plus and then if they say, no, we'll just read it all, because this was one full day.

MR. FELDMAN: Kilgallon was one full day and Alzate was two hours.

(The jury entered the courtroom at 5:05 p.m.)

THE COURT: Ladies and gentlemen, I have a list here which says they would like to have the following, testimony re --

1. Testimony of matchbook.

2. Calderon's business card.

3 3. All of Kilgallon's testimony.

4. List of evidence.

5. Alzate's testimony.

I wish to refer to Item 3 and 5. Three says they want all of Kilgallon's testimony. Ladies and gentlemen, you are entitled to it and it will be read to you, if you so desire. I must pinpoint out to you that it consists of 170 pages and will take considerable time. Alzate's testimony consists of 90 pages that took two hours.

Now, it could be that you have a specific provision in that testimony or points that you would like to clear concerning that testimony, which might take a little shorter time in reading, that is with respect to Kilgallon's and Alzate's testimony.

If you don't have a particular thing in mind we will read all of that testimony to you. You might want to consider in your jury room whether you will want to identify in a broad way what you wish or if you insist we will certainly be glad to read all of that testimony.

Do you want to talk about it in the jury room because I think Mr. Kilgallon took a whole day.

(The jury withdrew from the courtroom at 5:10 p.m.)

(At 5:28 p.m., jury note: Item 3 is surveillance from 554 Atlantic Avenue to arrest, Item 5, conversation of matchbook.)

THE COURT: Can you pick that out?

THE CLERK: Court Exhibit 3, Jury Note.

MR. FELDMAN: I would request that the Court ask them whether they are interested in Alzate testimony.

THE COURT: They are.

MR. FELDMAN: They say conversation of matchbook.

MS. O'BRIEN: That's only in Alzate's testimony.

MR. FELDMAN: Are they still interested in Alzate's testimony.

THE COURT: It says between Alzate and --

MR. FELDMAN: But the last one said, Alzate, all of the testimony. Would you ask them whether they want all of Alzate or only that.

THE COURT: We already asked them.

Next note, from time matchbook is given by Garcia to Alzate to the dropoff.

MS. O'BRIEN: Maybe they want the time sequence.

THE COURT: Whatever you agree on, I will do.

MR. FELDMAN: From Page 459 on.

(Page 34 to 46, Line 6 to Line 7.)

5 (Page 7 Line 6 to 76 Line 18.)

THE COURT: 82 Line 11

(Page 549 Line 4 to Page 550 Line 3. Page 566 Line 12 to 15.

(Thereupon read to the jury by the Clerk of the Court.)

(The jury entered the courtroom at 5:45 p.m.)

THE COURT: We will read surveillance to arrest. Mr. Court Clerk, read that testimony, please.

(The Clerk proceeded to read Page 34 Line 6 to 46 Line 7.)

JUROR 8: There is a mistake there, it was -- he said Bahar.

THE COURT: Read the entire sentence again. Do you want the cross-examination on that?

(The jury said no.

THE COURT: Now, Item 5, conversation concerning matchbook from Garcia to Alzate. Do you have that?

THE CLERK: Page 549 Line 4.

JUROR NO.12: Can we have the date of that conversation?

MS. O'BRIEN: May 5th and I believe the time was 8:00 8:15.

(The Clerk reads Page 545.

MS. O'BRIEN: The time is on Page 549.

6 THE CLERK: Page 548 Line 23.

THE COURT: Is that all of the testimony you wish from Alzate?

JUROR NO. 8: I want to know whether the match-book was given.

THE COURT: It's not in that testimony.

MR. FELDMAN: It says prior to that occasion.

THE COURT: It was prior to May 5th.

JUROR NO. 12: I would like to know if there is any recollection the first time that Mr. Garcia met Mr. Alzate, if there is any recollection between those days they met. The first time Alzate met Garcia.

THE COURT: And the last time if they met between those days.

There is apparently more than one meeting. They will pick out the dates and read it to you and that will save you some time. That's all you want from Alzate.

I want to remind you if you want any portion of the charge read, I will be glad to do that, but I will repeat at the same time that the law is contained in the charge and couldn't be a subject of speculation among the jurors.

(Continued on next page.)

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THE COURT: There is a juror who wants to call his mother and his mother only speaks German. I would be perfectly willing to have you, Mr. Feldman, and you, Ms. O'Brien, go into my chambers with this man while he makes that call to his mother and bring him right back. Ordinarily I don't let that happen and if anyone objects to it, it will not happen.

MR. FELDMAN: I understand German.

THE COURT: Mrs.O'Brien understands Gaelic so you can't have anything to lose. How about that, Mr. Feldman, would you want to do it that way? If you object --

MR. FELDMAN: I don't object to anything.

THE COURT: Before you get the pages, let's get this thing over with; Bruce and the Marshal, that's four of you, take this man.

MS. O'BRIEN: If the marshals go with him I don't like to be privy --

THE COURT: I think it is necessary. Jurors never leave the jury room when I'm here. Take my orders or he doesn't go out. My idea is much safer than yours.

MS. O'BRIEN: Why should we be --

THE COURT: I could tell you this: It is necessary for the protection of the secrecy of the jury and

no one can say something else was done or somebody talked to somebody else. I'm not going to continue this argument.

MR. FELDMAN: If I understand --

THE COURT: Don't say anything, just listen.

(Whereupon, the four people indicated escorted juror to Judge's chambers to make a phone call.)

(Counsel returned to courtroom.)

MR. FELDMAN: Now, your Honor, my understanding is that the question was -- first of all, they want to know if they met in between those dates. I don't think they want all that testimony read over, and I would object to that, on this day they met once, Saturday,Sunday --

THE COURT: We don't do it that way. We read the testimony. The trial is over. There is no more chance for stipulation.

How much testimony is there, Ms. O'Brien?

MS. O'BRIEN: Twelve pages, different locations.

THE COURT: Do you want to read the whole thing?

MR. FELDMAN: All I ask is, if the question is what date, Saturday second, instead of reading a whole page --

MS. O'BRIEN: Four occasions, three to four pages for each occasion.

MR. FELDMAN: May I see the pages? The question was very specific and he says --

THE COURT: I know all about it, I rule they are going to read the testimony as to those dates. You have to make the same ruling in English, German and Italian.

Bring in the jury.

(The jury enters the jury box.)

THE COURT: Ladies and gentlemen, we'll read the testimony as to the meetings between the first time Alzate met Garcia and the arrest. Proceed.

(Clerk reads page 14, line 20.)

(Clerk reads page 513, line 22.)

MR. FELDMAN: Can we get the date for that Saturday?

MS. O'BRIEN: The page before is May 2nd; May 2nd is the Friday.

THE COURT: Saturday, May 3rd, all right. That's not the first meeting.

MS. O'BRIEN: That's the first meeting with Garcia, May 2nd.

(Clerk reads.)

MS. O'BRIEN: 533, last line.

(The clerk reads.)

MS. O'BRIEN: Page 538, line 21.

(Clerk reads.)

MS. O'BRIEN: 533.

THE COURT: Let's find the date that they met, and I want an indication that Garcia met Alzate. I don't want a free date thrown around.

MR. FELDMAN: 533, line14.

(Clerk reads.)

MR. FELDMAN: That's a meeting with the truck handed over.

THE COURT: What is next?

MS. O'BRIEN: 546 -- the date is on 545 line 14.

(The clerk reads.)

MS. O'BRIEN: Page 546, line 21.

(The clerk reads.)

MS. O'BRIEN: There is another meeting shortly thereafter.

THE COURT: What page?

MS. O'BRIEN: Same page.

MR. FELDMAN: I am going to object to that most respectfully.

THE COURT: You object; your objection is overruled. Sit down, we are going to read the testimony thatthe jury wishes. I'll see you after thejury is recessed. I'm not going to have continual arguments from you. Read it. Is this about a meeting?

MS. O'BRIEN: Another meeting shortly thereafter.

THE COURT: Proceed.

(Clerk reads.)

MS. O'BRIEN: There is a subsequent meeting --

JUROR NO. 5: Continue that?

(Clerk continues reading.)

MS. O'BRIEN: One more meeting at page 555, line 23.

(Clerk reads.)

THE COURT: That is all. There is no other testimony that you wish? If the jury wishes, instead of going out for a full-fledged dinner, we'll send some sandwiches in. Someone said they hadn't eaten since the morning. Do you wish it or not? I'll order some sandwiches.

JUROR NO. 5: We'll tell you after we go in.

THE COURT: If you do order, make it simple and we'll try to rush over there and pick up the sandwiches rather than wasting an hour or so before they come.

(Whereupon the jurors were excused from the courtroom.)

MR. FELDMAN: I want to indicate for the record, the Court has on numerous occasions interrupted me

in the middle of my sentence, and I don't think that I was inappropriate in making a request. I think I understood very well what the jury asked for. They asked for the meeting and Mrs. O'Brien belatedly wanted the whole transaction to go on from the meeting on 34th Street, from the man following the car to the man seeing him on 56th Street. I think it was extremely prejudicial to my man, and I have every right to state to the Court I have objection when the specific question was the date of the meeting, the meeting in between the first meeting and the last meeting.

THE COURT: Let me put on the record, throughout this trial you have, instead of obeying the ruling of the Court, insisted on rearguing and rising in a rather defiant mood and showing your combative and, I think, your belligerent approach; and here where the jury was already sent to the jury room for deliberation and have a right to ask for all of the testimony reread, and in this particular case they specifically wanted dates. We're not interested in stipulations. The only testimony that can now go into that jury room is that which has already been brought out at the trial, and that's what I insisted upon and, indeed, as we read from time to time some of this testimony which you are now objecting to, I asked them whether

they wanted to read further and they said, yes. Instead of taking the Court's ruling after the jury was back in the box and had begun, you got up again and made a loud protest when you should have accepted my ruling. If you have an objection, make it, but you have no right -- nobody else does it -- to act the way you do when this jury comes in after they begin their deliberations and you tell me what can be read from the testimony and what cannot. You put your objection down. And I want the record to show that.

MR. FELDMAN: Your Honor --

THE COURT: You wait till I finish.

Your conduct has been wholly inappropriate and unacceptable, and it seems to me subject to sanctions. Never do that again. If they ask for any more testimony I'll make the decision as to what testimony will or will not be read after reading this note, not you, and you have no right to get up here while they're -- really theoretically deliberating, and insisting on some stipulation or some other fact that they are reading too much. They have a right to have it all read if they wish.

MR. FELDMAN: Judge, I merely indicated I wasn't looking for a stipulation. We talked, if we could agree, there would be no problem.

THE COURT: That's not the way to run a court. I'm going to run the trial and that's final.

MR. FELDMAN: I'm not arguing with your Honor.

THE COURT: You make it difficult for me to do it.

MR. FELDMAN: The Court is not allowing me to finish a sentence. Mr. Torres asked specifically about the meetings between Mr. Garcia -- specifically about the meetings between Mr. Garcia and Mr. Alzate, between the first meeting and the dates. He wanted to know whether they had met before, both on the 2nd of May and subsequent meetings and only the dates, but of course I think that all the testimony that was read back to the jury was all direct testimony, and I think it is reasonable for me to say within the restrictive limits of the request, ask that the Court do that, and Mrs. O'Brien chose those particular sections and she wanted it to continue to get the entire flow.

THE COURT: You are entirely wrong.

MS. O'BRIEN: May I state my position? My position is that Mr. Torres had requested four meetings, the twelfth juror had requested about four meetings. He did not specifically say that he wanted specific dates. He wanted to know any meetings.

MR. FELDMAN: My recollection was --

THE COURT: Now, you see, the reason why you are not able to finish a sentence is because you always interrupt me or someone else. Who is interrupting the interrupter? Proceed.

MS. O'BRIEN: And the Government, both sides had an opportunity to look at the transcript, we certainly just got those pages out that dealt with the four specific meetings, and if we just mentioned May 3rd, May 4th, it would be totally meaningless to the particular jurors. Mr. Feldman had an opportunity to limit that or cross-examine any of the transcripts or have a discussion as to what other transcripts he would want read back to the jury.

THE COURT: I have heard this. I want no further argument on it. I have a strong suspicion they are coming in one way or the other.

(Whereupon the court stood in recess.)

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mm/nc

(Out of the hearing of the jury.)

THE CLERK: Court Exhibit 2, jury note No. 2.

Jury note marked Court Exhibit 3.

Court Exhibit 4, jury note.

Court Exhibit 5, jury note.

(So marked.)

(Time noted: 7:40 o'clock p.m.: Out of the hearing of the jury.)

THE COURT: Did you see the note?

Show it to Mrs. O'Brien.

THE CLERK: Court's Exhibit 6, jury note for further instructions.

(Jury present.)

THE COURT: I have a request here that reads as follows: "We would like your Honor to explain the laws concerning circumstantial evidence and reasonable doubt."

THE COURT: I'd like to say it is not statutory law, it is law that has been developed over the years by the cases, so when I read this to you, I read the result of case law not statute; I will read to you exactly what I read to you at the first time.

I said that "the Government's case against this defendant rests both on direct and circumstantial evidence" -- Juror No. 8, please, this is a dignified

proceeding, keep that in mind.

As to the subject of circumstantial evidence, that is evidence of a fact -- am I talking loud enough -- that is a fact from which you may reasonably infer the existance of the non-existance of another fact.

I will give you the example I gave you again; for example, suppose you were in a room with no windows in it and a person comes into that room wearing a raincoat which is wet, carrying an umbrella which is wet, that would be circumstantial proof that it is raining outside, even though you did not know that it was raining.

Now, of course, it is possible that someone could have thrown water on that person or he could have pressed his umbrella in a bucket of water. That is possible, too.

From the circumstances I have related, that is also circumstantial proof that it is raining outside.

We will give you another illustration. I will repeat it to you. I guess it was in the afternoon when we started which was a little closer, in the courtroom. Suppose any member of the courtroom would ask a court clerk, -- we have two -- Courtroom Clerk No. 1, for a pad and a pencil to make some notes.

3 And then we took a recess and then you came back and then another courtroom Clerk -- we will call him Clerk No. 2 , not Clerk No. 1 to whom the member of the jury first spoke with, handed that juror a pad and a pencil. That certainly would be circumstantial evidence that Clerk No. 1 had given the juror's message to Clerk No. 2, because otherwise how would Clerk No. 2 know about it.

As these words indicate, circumstantial evidence means evidence involving circumstances.

The example I gave about these two Courtroom Clerks shows there was no direct evidence, you never heard Clerk No. 1 give the message to Clerk No. 2, you didn't know anything about that, all you knew when you came back Clerk No. 2 gave you a pad and pencil.

That was circumstantial evidence that Clerk No. 1 had delivered the message to Clerk No. 2.

Circumstantial evidence means involving circumstances surrounding the incident and details from direct observation.

It is more than and it is fundamentally different from a mere guess or conjecture or surmise. There are circumstances there, you are not just guessing at something out of the clear sky. You know you

gave a message to No. 1 and you know that No. 2 gave you the pad and pencil.

So it is a little more than guesswork. You have something to base it upon, No. 1's message.

So, as I said, it is different from a conjecture or surmise for under our law nobody can be convicted of guesswork or speculation.

You can see that. It is a matter of reason. The law is not unreasonable. You have to have a basis for it, an inference that is reasonable drawn from the facts.

You have a right to draw inferences just like you had a right to draw inferences from all the facts testified to, and it is evidence. You can fill in the gap and infer that No. 1 had told No. 2, if it is a reasonable inference.

Now, analyzing the evidence you may draw reasonable inferences based upon your own common sense, your own general observation and experience from any facts that you find were proved that whil an inference may be reasonable drawn from a reasonable fact, it may not be drawn from another inference.

You start from something. When two inferences, two different inferences may be drawn from a different

fact, both of them reasonable, one consistent with guilt and one consistent with innocence, then you must draw the inference of innocence.

But I am talking about reasonable inferences. A logical inference is to be distinguished from sheer speculation or just suspicion.

Circumstantial evidence is legal and it is acceptable evidence. It is that evidence which tends to prove a controverted or disputed fact by proof of other facts which will have a legitimate tendency to lead the mind to a conclusion that the fact which is sought to be established does exist predicated on those circumstances.

Circumstantial evidence may consist of an accumulation of many details which are so logically interrelated and so consistent with each other and so inherently probable that you may not have the slightest doubt as to its truthfulness and its accuracy.

Circumstantial evidence may consist of many reasonable inferences drawn from proven facts which in their accumulative effect may leave no reasonable doubt that the fact exists which is sought to be proven.

The rule makes no distinction between direct and circumstantial evidence and circumstantial evidence may be enough to convict, but the circumstantial evidence must be so convincing that it leaves you

6 no reasonable doubt.

If you have a reasonable doubt after you consider all of the circumstantial and the other evidence together with it, if you have a reasonable doubt, then under those circumstances then you must acquit the defendant.

That's in substance what I mean by circumstantial evidence.

Now, you'd like to have a word or two upon the term "reasonable doubt." I think I said this afternoon when I first mentioned the subject that it is not a subject that can be described with mathematical certainty.

It has a quality that depends upon what is reasonable in your mind.

The term reasonable doubt does not mean just a possible doubt that you might have; it means such a reasonable doubt as a careful, prudent and reasonable man or woman ought to entertain in the circumstances proved.

It just means a doubt based upon reason and which is reasonable in view of all of the evidence but the direct and circumstantial evidence.

The key word is reasonable. A reasonable doubt may arise from the evidence produced or from

the lack of evidence in the case.

It is the obligation of the Government to prove a defendant guilty beyond a reasonable doubt. But it is not the obligation of the Government to prove a defendant guilty beyond a shadow of a doubt.

It is rarely possible to prove anything to an absolute certainty or beyond all possible doubt. Seldom can one prove a controvertial fact beyond all certainty.

A reasonable doubt does not mean anything vague or whimsical or imaginary doubt nor does it mean a possible doubt created by a reluctance on the part of a jury to perform an unpleasant task. It means a doubt arising out of the evidence, whether it is direct or circumstantial or the lack of evidence which is a reasonable doubt.

A reasonable doubt is a doubt that would cause prudent men and women to hesitate to act in matters of importance to themselves.

Now, if after a fair and impartial consideration of all of the evidence, both direct and circumstantial or lack of evidence, you have a reasonable doubt as to the defendant's guilt then,of course, it is your duty to acquit him.

If after a fair and careful consideration of all of the evidence, direct and circumstantial, you

determined only by you and not by the arguments and opinion of counsel and in reaching this conclusion with respect to a reasonable doubt you must consider all of the evidence together as a whole, not just a particular portion of the evidence isolated from the rest of the evidence.

Now, that is all I can tell you, ladies and gentlemen.

I think by this time perhaps I get the impression that your food has arrived.

Thank you very much. I will be here to clarify any questions you may have.

(Time noted: 8:30 p.m.)

(Out of the hearing of the jury.)

THE COURT: We have a note, "Jury has a verdict."

xxx THE CLERK: Court Exhibit No. 7. Jury note.

(Jury present, 8:41 o'clock p.m.)

THE CLERK: Madame Forelady, ladies and gentlement of the jury, have you agreed upon a verdict?

THE FORELADY: Yes.

THE CLERK: How do you find the defendant Aebelos on the one count of the indictment?

THE FORELADY: Guilty.

THE CLERK: Ladies and gentlemen of the jury, as the Court has received your verdict you say you

8 believe that you have no doubt that is reasonable, as to the defendant's guilty then it is equally your plain duty to convict him.

One is said to be convinced in a case of this kind,beyond a reasonable doubt when after an impartial consideration and weighing of all of the evidence, circumstantial and direct, one can conscientiously say that he is convinced to a moral certainty of the truth of the charge. Thus you look at all of the evidence, direct and circumstantial, introduced in this case. You ask yourselves whether or not you are satisfied beyond a reasonable doubt that the offense has been committed as charged in this indictment.

If you are so satisfied, it will be your duty to convict the defendant. If there exists in your mind a reasonable doubt of the defendant's guilt it would be equally your duty to give him the benefit of that doubt and acquit him.

If there are two reasonable conclusions to be drawn from all of the evidence equally supported by all of the evidence, one of which is consistent with the guilt of the defendant, the other consistent with his innocence, then you must adopt that conclusion consistent with his innocence.

The question of reasonable doubt can be

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of NOV. 1975 deponent served the within Appendix upon:

US Atty Eastern District of NY

attorney(s) for Appellee

in this action, at 225 Cadman Plaza East Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 1 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 26 day of NOV. 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976